

December 27, 2007

Ms. Mary McCoy
908 West Street
P.O. Box 263
Bethel, DE 19931

**RE: Freedom of Information Act Complaint
Against Town of Bethel**

Dear Ms. McCoy:

On October 17, 2007, our Office received your complaint alleging that the Town of Bethel ("the Town") violated the open meeting requirements of the Freedom of Information Act, 29 *Del. C. Ch. 100* ("FOIA"), by deciding to contract with Atlantic Well Drilling to replace two wells and issue the necessary permits without the Town Council's first discussing the matter in a public meeting. You allege that the President of the Town Council, Jeff Hastings, did not have authority under the Town Charter "to proceed on permits and contracts without the approval of Town Council."

By letter dated October 18, 2007, our Office asked the Town to respond to your complaint in writing by October 29, 2007. Our Office received the Town's response by facsimile on October 29, 2007 and by regular mail on October 31, 2007. On November 13, 2007, our Office asked the Town for additional information which our Office received on November 19, 2007.

According to the Town:

On or about mid-August, it was discovered that the water supply for the Bethel Community House was no longer functioning ("House Well"). The well had gone dry. Another well, located at the Town Park, was not functioning properly ("Park Well"). Although the Park Well was not dry, the flow of water from that well was inadequate to irrigate the park. Given the need for water supply to both facilities, combined with the approach of a breakfast event in the Community House associated with the Bethel Heritage Days, a decision was made to hire Atlantic Well Drilling, Inc. to drill two new wells. Absent this decision, there would have been no running water or toilet facilities at the Community House. The decision was made by Jeff Hastings, the President of the Town Council, in consultation with Anna Lee Robinson, the Treasurer.

According to the Town, "[n]o public meeting was held regarding the decision to install two replacement wells because the President of the Town Council had the authority as per the Town Charter and the ordinance adopted on November 9, 2006 to make the expenditure made." The Town contends it did not violate FOIA because FOIA "does not specify what kinds of decisions are required to be made at public meetings. The Town of Bethel did not violate FOIA by making this decision without having a public meeting. Any discussion between Jeff Hastings and Anna Lee Robinson did not constitute a public meeting . . . since neither a quorum nor a special committee of the Town Council was present."

RELEVANT STATUTES

FOIA requires that "[e]very meeting of all public bodies shall be open to the public except those closed" for executive session as authorized by statute. 29 *Del. C.* §10004(a).

FOIA defines a "public body" to include any "committee" or "subcommittee" which is "established by any body established by the General Assembly of the State, or appointed by any body or public official of the State" *Id.* §10002(c).

FOIA defines a "meeting" as "the formal or informal gathering of a quorum of the members of any public body for the purposes of discussing or taking action on public business." *Id.* §10002(b).

LEGAL ANALYSIS

The essence of your complaint – as outlined in your letters to the Town dated September 20 and October 7, 20007 which you attached to your complaint – is that Mr. Hastings exceeded his authority under the Town charter by contracting with Atlantic Well Drilling to replace the two wells and issue the necessary permits. Our Office does not have to make a determination on that issue, however, because it is an issue of municipal law which is outside our Office's jurisdiction under FOIA.

The record shows that the decision to contract with Atlantic Well Drilling to replace the two wells was made by the President of the Town Council, Mr. Hastings, and the Town Treasurer, Anna Lee Robinson. The Town has confirmed that the Town Council has five authorized but only four current members: Jeff Hastings, Anna Lee Robinson, William Rutledge, and Kevin Phillips

(Councilman Mark Shaver resigned in June 2007). Any discussions which might have occurred between Mr. Hastings and Ms. Robinson concerning the two wells would not have been a "meeting" of the Council as defined by FOIA because it did not involve "a quorum of the members" of the Council. 29 *Del. C.* §10002(b).

The Town Charter authorizes five Council members but there has been one vacancy since June 2007. Section 13 of the Town Charter provides: "A majority of the members elected to the Council shall constitute a quorum to do business" There were only four elected members of the Council at the time Mr. Hastings and Ms. Robinson discussed and took action on the two wells. They did not constitute quorum for purposes of FOIA because under the Town Charter a quorum requires a majority (three) of the elected members.

Nor is there any evidence in the record to show that the full Council appointed or established Mr. Hastings and Ms. Robinson as a "committee" of the Council so as to make the two of them a "public body" for purposes of FOIA. In contrast, in *Att'y Gen. Op.* 02-IB23 (Dec. 23, 2002), the record showed that the five-member Town Council appointed a Review Planning Committee consisting of three members; when two of the members met to discuss public business, our Office determined that a quorum of a public body met in violation of the open meeting requirements of FOIA.

CONCLUSION

For the foregoing reasons, our Office determines that the Town did not violate FOIA by not meeting in public to discuss what the Town intended to do to replace the two wells. The open meeting law did not come into play because the record shows that the decision to contract with Atlantic Well Drilling to repair the two dry wells was not made by a quorum of the elected members of the Town Council (three members), but rather by two members of the Council (Jeff Hastings and Anna Lee Robinson). The record does not show that Mr. Hastings and Ms. Robinson were acting as a committee appointed or established by the full Council so as to constitute a public body for purposes of the open meeting law.

Very truly yours,

W. Michael Tupman, Esquire
Deputy Attorney General

APPROVED

Lawrence W. Lewis, Esquire
State Solicitor

Ms. Mary McCoy
December 27, 2007
Page 6

cc: The Honorable Joseph R. Biden, III
Attorney General

Richard G. Andrews, Esquire
Acting Chief Deputy Attorney General

Jennifer Oliva, Esquire
Assistant State Solicitor

John E. Tarburton, Esquire
Town Attorney

Mary Ann Haley
Opinion Coordinator